

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CHEBERE V.,

Claimant,

vs.

FAR NORTHERN REGIONAL CENTER,

Service Agency.

OAH No. 2011030834

DECISION

This matter was heard before Administrative Law Judge Susan H. Hollingshead, State of California, Office of Administrative Hearings (OAH), in Redding, California, on August 4, 2011.

The Service Agency, Far Northern Regional Center (FNRC), was represented by Phyllis J. Raudman, Attorney at Law.

Claimant was present throughout the hearing and was represented by his mother.

Oral and documentary evidence was received. At the conclusion of the hearing, the record was closed and the matter was submitted for decision.

ISSUES

Is claimant eligible for regional center services based on a “fifth category” qualifying disability because he has a condition closely related to mental retardation, or that requires treatment similar to that required for individuals with mental retardation, pursuant to Welfare and Institutions Code section 4512, subdivision (a), and California Code of Regulations, title 17, section 54000?¹

¹ Unless otherwise indicated, all statutory references are to the California Welfare and Institutions Code.

FACTUAL FINDINGS

1. Claimant is a twenty-four-year-old unconserved man seeking services from FNRC. He spent much of his childhood in residential programs or group homes for emotionally disturbed children. Due to his behaviors, claimant's mother noted that there was difficulty when he tried to live at home. As an adult, he has attempted to live independently in various living situations and is now living with his mother. Claimant was married and divorced and has one daughter of whom he does not have custody. His social judgment is described as being poor. He tends to be "naïve," makes friends that take advantage of him, and has "gotten into legal trouble" over the years. Claimant's ability to keep track of daily responsibilities, including understanding time, appears to be compromised, but he is able to make simple meals and attend to his hygiene and personal care needs.

Claimant has a history of using a variety of psychotropic medications beginning at about age six. There was some documented success with medication usage and evidence that when he discontinued use he was found to be "decompensating steadily." He also has alcohol and drug use in his history.

2. On February 17, 2011, FNRC Intake Specialist, Kathleen Hamill, completed a Social Assessment of claimant. The FNRC Eligibility Review Team then met on March 2, 2011, to determine claimant's eligibility for services. After considering the February 17, 2011 Social Assessment, as well as a review of records received and parental input, the team determined that claimant was not eligible for regional center services.

3. As a result of the eligibility team determination, A Notice of Proposed Action (NOPA) was issued on March 3, 2011, informing claimant that he did not meet the criteria for FNRC eligibility. The NOPA stated:

You do not have mental retardation and show no evidence of epilepsy, cerebral palsy, autism, or a disabling condition found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation. Psychological records show evidence of Alcohol Abuse and Borderline Intellectual Functioning but these are not qualifying conditions for regional center services. Eligibility Review (multi-disciplinary team) determined on 3/2/11 that you are not eligible for FNRC services based on Psychological evaluation dated: 7/30/07 by Ray Carlson, Ph.D., Social Assessment dated: 2/17/11 by Kathleen Hamill, Intake Specialist, Parental Input received on 2/17/11 by Kathleen Hamill, Intake Specialist. Other records include: 12/4/03 Treatment Review by Victor Youth Services; 6/1/05 Letter by Peter Emmons, School Principal; 9/25/06 documentation by Social Security Administration; 9/9/05 Inquiry notes by Susan Rogge; 11/18/04 IEP by Shasta County SELPA.

The NOPA stated that the authority for the action was:

Regional Centers may only provide services to individuals who have developmental disabilities as defined in Title 17, California Code of Regulations, Section 54000.

4. On March 11, 2011, claimant's mother filed a Fair Hearing Request on his behalf, disputing his ineligibility for services stating:

You have not proven to me that my son's condition is not multifaceted not just mental. He has not had an assessment and even though he has mental conditions. He may also have major impairments of cognitive +/- social functions before the age of 18 which will last a lifetime. I take care of him with no help. He has all the conditions in Section 54001(b) except problems with mobility. He needs to be in Far Northern so that he can be supervised [sic] in some kind work program that he can do, and so that I can get some respect [sic] for me, and referrals for help in the community.

5. Pursuant to the Lanterman Act, section 4500, et seq., regional centers accept responsibility for persons with developmental disabilities. Section 4512 defines developmental disability as follows:

"Developmental disability" means a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual....[T]his term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation [commonly known as the "fifth category"], but shall not include other handicapping conditions that are solely physical in nature.

6. California Code of Regulations, title 17, section 54000, further defines the term "developmental disability" as follows:

(a) "Developmental Disability" means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

(b) The Development Disability shall:

(1) Originate before age eighteen;

(2) Be likely to continue indefinitely;

(3) Constitute a substantial disability for the individual as defined in the article.

(c) Developmental Disability shall not include handicapping conditions that are:

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.

7. Welfare and Institutions Code section 4512, subdivision (1), defines substantial disability as:

(1) The existence of significant functional limitation in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person:

(1) Self-care.

(2) Receptive and expressive language.

(3) Learning.

(4) Mobility.

(5) Self-direction.

- (6) Capacity for independent living.
- (7) Economic self-sufficiency.

8. Some disagreement about what constitutes a “fifth category” disability was addressed in *Mason v. Office of Administrative Hearings* (2001) 89 Cal. App. 4th 1119. In that opinion, the court noted:

“...the terms ‘closely related to’ and ‘similar treatment’ are general, somewhat imprecise terms. However, section 4512(a) does not exist, and we do not apply it, in isolation. ‘Where the language of a statute fails to provide an objective standard by which conduct can be judged, the required specificity may nonetheless be provided by the common knowledge and understanding of members of the particular vocation or profession to which the statute applies.’ Here, the Lanterman Act and implementing regulations clearly defer to the expertise of the DDS and R[egional] C[enter] professionals and their determination as to whether an individual is developmentally disabled. General, as well as specific guidelines are provided in the Lanterman Act and regulations to assist such RC professionals in making this difficult, complex determination. Some degree of generality and, hence, vagueness is thus tolerable.

...The fifth category condition must be very similar to mental retardation, with many of the same, or close to the same, factors required in classifying a person as mentally retarded. Furthermore, the various additional factors required in designating an individual developmentally disabled and substantially handicapped must apply as well. (*Id.* at p. 1129.)

9. Jan Edward Freemon, Ph.D., is a licensed clinical psychologist who held the position of FNRC Staff Clinical Psychologist for fourteen years. In that capacity he has participated as a member of the interdisciplinary eligibility review committee that is responsible for determining whether a consumer meets the eligibility requirements for regional center services, and has personally conducted numerous psychological evaluations. He testified that in light of the court's decision in *Mason*, the Association of Regional Center Agencies (ARCA) established guidelines to assist the California regional centers in determining fifth category eligibility.

10. The diagnostic criteria for “Mental Retardation” as set forth in section 4512 is defined in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR)² to require:

A. Significantly subaverage intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test...

B. Concurrent deficits or impairments in present adaptive functioning (i.e., the person’s effectiveness in meeting the standards expected for his or her age by his or her culture group) in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.

C. The onset is before 18 years.

11. Dr. Freemon testified that when an individual’s IQ rises above 70 it is essential for the team to determine that there are substantial adaptive deficits that are clearly related to cognitive limitations rather than factors such as psychiatric conditions, poor motivation, physical limitations, or substance abuse. They will also consider other factors such as whether an individual’s verbal IQ is significantly different from the performance IQ. When there is a greater discrepancy in these scores, an individual may function more as a person with learning disabilities than persons with mental retardation. An essential feature of mental retardation is significantly subaverage general intellectual functioning.

² The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR) is the current standard for diagnosis and classification. It is a multiaxial system which involves five axes, each of which refers to a different domain of information as follows:

Axis I	Clinical Disorders
	Other Conditions That May Be a Focus of Clinical Attention
Axis II	Personality Disorders
	Mental Retardation
Axis III	General Medical Conditions
Axis IV	Psychosocial and Environmental Problems
Axis V	Global Assessment of Functioning

12. Claimant has an extensive psychiatric history and qualified for special education services under the handicapping condition of Severally Emotionally Disturbed. He began receiving 3632³ services in 1994 and attended various day treatment and residential placements for severely emotionally disturbed children. A “Shasta County Mental Health Services G.C. Chapter 26.5/AB3632 Assessment” dated January 21, 1999, noted that claimant presented with a long history of mental health issues and initially qualified for AB3632 services with a diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) and two rule out diagnoses of Overanxious Disorder and Dysthymic Disorder. He received counseling and medication management as his diagnostic picture became more clarified. Claimant had a history of psychotic symptoms, episodes of depression, oppositional behavior and symptoms of anxiety. There was no mention of a developmental disability.

The assessment report noted that in August, 1994, Dr. Kevin Park, M.D., diagnosed claimant with Bipolar Mood Disorder. In 1997, Rina Weingold, L.C.S.W., assessed claimant and gave him a diagnosis of Post Traumatic Stress Disorder, as well as multiple learning disorders.

A Wechsler Intelligence Scale for Children-Third Edition (WISC-III) was administered by David Zuccolotto, Ph.D., on July 29, 1998. Dr. Zuccolotto felt that claimant’s scores were “likely influenced by his long history of mental health impairment, intermittent exposure to a school setting, and his family environment.” The following scores were obtained and noted in the assessment report:

Verbal Score: 74
Performance Score: 100

13. Claimant’s Triennial Evaluation Documentation/Report, dated June 4, 2003, by the Shasta County Special Education Local Plan Area, included the previous WISC-III findings from July 29, 1998, and included results of the Test of Nonverbal Intelligence (TONI-III). This test was performed by Don Zoll, School Psychologist, and determined that claimant ranked in the seventy-fifth percentile with a Quotient of 110. He continued to qualify for special education based on the following: “Emotionally Disturbed (Bipolar D.O., PTSD).”

14. A three page IQ testing report was provided that contained claimant’s name and was dated June 4, 1997. However the parties had no information regarding the identity of the examiner or circumstances of that examination. The summary of this report noted that claimant had a Verbal score of 80, Performance score of 80 and a full scale score of 78.

15. Paula Solomon, Ph.D., performed a psychological evaluation of claimant on September 21, 1998, and October 5, 1998, as a result of a new residential placement at Full Circle Residential Treatment Program. Dr. Solomon concluded as follows:

³ “3632” refers to a law that requires agencies to coordinate provision of mental health services for students with disabilities.

DIAGNOSTIC IMPRESSION:

298.9 Psychotic Disorder, NOS
309.81 Post Traumatic Stress Disorder, with psychotic symptoms
300.4 Dysthymic Disorder, early onset
295.4 Rule out Schizophreniform Disorder
315.31 Expressive Language Disorder

16. The residential client Treatment Review Report for Victor Youth Services/North Valley School dated March 4, 1992, included the following DSM-IV Diagnoses by treating Psychiatrist, Aravind Pai, M.D.:

Axis I:	296.80 Bipolar Disorder-NOS 309.81 Post Traumatic Stress Disorder-By History
Axis II:	V.71.09 None
Axis III:	No Allergies
Axis IV:	Dysfunctional Family Life
Axis V:	GAF=35 (current) GAF=40 (past year)

17. A Victor Youth Services/North Valley School Community Client Treatment Review Report dated November 24, 2003, included the following DSM-IV Diagnoses by treating Psychologist, Okey Nwangburuka, M.D., Shasta County Mental Health:

Axis I:	296.80 Bipolar Disorder, NOS 309.81 Post Traumatic Stress Disorder
Axis II:	V.71.09 None
Axis III:	None
Axis IV:	Problems with primary support group and problems with education
Axis V:	GAF=35 (current) GAF=40 (past year)

This determination was a follow up to Dr. Nwangburuka's diagnoses from the prior year:

Axis I:	309.81 PTSD 296.94 Mood Disorder with psychotic features
Axis II:	V71.09 No Diagnosis
Axis III:	None reported
Axis IV:	Problems with primary support group, social environment, and education

18. On July 20, 2007, claimant was referred to Ray H. Carlson Ph.D., Licensed Clinical Psychologist, for a "psychological evaluation in the context of a custodial dispute involving his ex-wife." The report of that evaluation dated July 30, 2007, noted that Dr. Carlson utilized the Wechsler Adult Intelligence Scale-Revised Split-Half Short Form and

determined that claimant had a Verbal Score of 75, a Performance Score of 78, with a Full Scale Score of 78. Dr. Carlson made the following conclusions:

DIAGNOSTIC IMPRESSION:

Axis I:	305.00	Alcohol Abuse
Rule Out	296.80	Bipolar disorder not otherwise specified
Rule Out	311	Depressive Disorder not otherwise specified
Axis II:	V62.89	Borderline intellectual functioning Some antisocial, narcissistic, and dependent personality features

19. It is noteworthy that Dr. Carlson provided an Axis II diagnosis of claimant. At no other time was there evidence of an Axis II diagnosis in claimant's history. This determination was given little weight due to the abbreviated testing instrument, utilized in the context of a custody determination, and administered just prior to claimant's twenty-first birthday.

20. Claimant's mother contends that he is eligible for regional center services based upon his having a condition closely related to mental retardation, or requiring treatment similar to that required by individuals with mental retardation. She testified that claimant is "in need of the same care as a developmentally delayed person." He has not been able to pass his driver's test to obtain his license nor has he been able to pass the Ability to Benefit (ATB) test so he can get into the disabilities program and go to Shasta College with financial aid. She contends that he "is being denied an education because he can't afford to go to school, eat lunch, and buy supplies to improve himself. He dreams of being a fireman." She contends that he has "significant deficits in adaptive skills that results in him functioning like a person with mental retardation and has similar problems as a person with developmental delays and needs the same care in at least three categories...

21. A September 25, 2006, Social Security Administration Notice of Decision determined that "based upon a redetermination of the claimant's continuing eligibility for supplemental security income upon attaining age 18 under section 1614(a)(3)(H) of the Social Security Act, the claimant continues to be disabled." Claimant previously received supplemental security income benefits based on disability as a child. Benefits were redetermined under the rules for determining eligibility in adults when claimant attained age 18 and it was determined that claimant was no longer disabled as of February 1, 2005. Appeal followed, resulting in redetermination and the subsequent September 25, 2006, decision.

22. Peter Emmons, Principal of Independent Educational Programs School, provided a brief report on claimant's school related behaviors, for consideration in this appeal, which included the following:

[Claimant] has been enrolled in nonpublic special education programs for students with emotional disabilities. Over

the past five years [claimant] has had a well documented set of consistent, predictable behaviors that have not changed despite numerous and intensive interventions. In my opinion, these behaviors seem to be at least partially out of his control. He has intense manic episodes. During these time [claimant] has delusional, grandiose, and often paranoid thinking, This thinking leads to actions that often put him at risk of injury and certainly limit his ability to function in any type of structured setting. Over the past 5 years [claimant's] school attendance has been spotty at best. He is absent or late for school about 30% of the time . . . Academically, claimant's performance was impacted by his defiance, frequent absences and his delusional thinking . . .

23. Claimant's mother contends that the Social Security Administration's decision that claimant qualifies for benefits based on a continuing disability, qualifies him for regional center services. That argument was not persuasive as each agency follows its own guidelines for making eligibility determinations. In addition, the Social Security Administration Decision, while suggesting that claimant presented with borderline intellectual functioning, found that his bipolar disorder was the "medically determinable physical or mental impairment" which met the agency's criteria.

24. Claimant's mother is caring and concerned for her son. She testified that she helps him with his daily schedule, cooking, grocery shopping and transportation needs. She also assists with his paperwork, phone calls and business matters. He has difficulty with self direction and economic self- sufficiency. She stated that she has "also had bipolar and lives only on SSI." She stated that she needs help and "would like to have him in Far Northern to give me a little bit of a break." She also worries about "what will happen to him if I'm not there."

When asked what services claimant's mother was seeking for her son, she responded that she would like regional center "help with a work experience, something to do during the day and a ride, some transportation, maybe a bus pass." She stated that these are "two things I know of."

25. Claimant testified as to deficits in some of his adaptive skills. He stated that "I am not retarded" and "I just want to go to college." Claimant would like to obtain his driver's license instead of "taking the bus or using my skateboard."

26. Dr. Freemon testified that based on record review, his professional expertise and that of the interdisciplinary team; claimant does not have a qualifying condition for regional center services. He opined that claimant did not demonstrate a degree of global intellectual impairment similar to that possessed by persons with mental retardation.

He testified persuasively that FNRC did not dispute the fact that claimant has significant deficits in adaptive functioning but opined that such deficits would most likely be related to his mental health conditions and/or learning disabilities rather than any cognitive limitations, and

he would assume that there was a “high probability that claimant’s deficits are caused by his psychiatric disorders and behaviors.” He also suggested that when claimant is not taking his medications, he is not functioning at the higher level that he is capable of.

Nor was the treatment required for these conditions demonstrated to be similar to that specifically required by an individual with mental retardation. Claimant would be better served from a treatment perspective of an individual with psychiatric disorders. Those treatments would not be the same or similar to those required by individuals with mental retardation. It appears that claimant’s adaptive behavior deficits are due to his psychiatric disorders rather than a developmental disability. Therefore, it cannot be found that his condition is closely related to mental retardation or requires treatment similar to that received by individuals with mental retardation

27. There was no evidence presented to demonstrate that claimant suffers from mental retardation, cerebral palsy, epilepsy or autism.

LEGAL CONCLUSIONS

1. Eligibility for regional center services is limited to those persons meeting the eligibility criteria for one of the five categories of developmental disabilities set forth in section 4512 as follows:

“Developmental disability” means a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual....[T]his term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation [commonly known as the “fifth category”], but shall not include other handicapping conditions that consist solely physical in nature.

Handicapping conditions that consist solely of psychiatric disorders, learning disabilities or physical conditions do not qualify as developmental disabilities under the Lanterman Act and are specifically excluded under California Code of Regulations, title 17, section 54000, subdivision (c)(1) and (2).

2. The evidence was persuasive that claimant has significant limitations. He has an extensive mental health history and learning disabilities.. While he is certainly impaired by these conditions, the evidence did not prove that claimant’s current impairments resulted from a qualifying condition which originated and constituted a substantial disability before the age of eighteen. While treatment and/or services provided by the regional center could certainly benefit claimant as well as a vast array of other individuals, fifth category eligibility requires a

need based on impairments that are not based solely on psychiatric disorders and/or learning abilities.

There was no evidence to support a finding of a condition closely related to mental retardation, or that requires treatment similar to that required for individuals with mental retardation. It was not established that claimant has mental retardation, cerebral palsy, epilepsy or autism. Accordingly, he does not have a developmental disability as defined by the Lanterman Act and is not eligible for services through FNRC.

3. It was highly recommended that claimant consider pursuing potential assistance from Shasta County Mental Health and/or the Department of Rehabilitation.

ORDER

Claimant's appeal from the Far Northern Regional Center's denial of services is denied.

DATED: August 18, 2011

SUSAN H. HOLLINGSHEAD
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. An appeal from the decision must be made to a court of competent jurisdiction within 90 days of receipt of the decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)